FILE COPY

FILED
DEC 5 19
CHARLES ELMORE C
CL

No. 66

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

UNITED STATES OF AMERICA, Appellant,

vs.

HARRY M. WURZBACH, Appellee.

BRIEF FOR APPELLEE.

HUGH R. ROBERTSON,
Attorney for Appellee.

THE SIGMUND PRESS, SAN ANTONIO

INDEX

Page

Statement of case 1

Statute involved 1

Charge in indictment 2

Reasons for sustaining motion to quash 2-3

Questions presented 3

Appellee's First Proposition, that statute does not apply to offense charged in indictment 3

Appellee's Second Proposition, that statute, if does apply, invalid because of ambiguity and uncertainty 17

Appellee's Third Proposition, that statute, if does apply, unconstitutional 25

Political purpose, definition of 22

Conclusion 31

CITATIONS

Page

Cases:

Curtis, Ex parte, 106 U. S. 371 ..... 26, 28, 29

James vs. Bowman, 190 U. S. 127 17

McFarland vs. U. S. 19 Fed. (2nd) 807 17

Newberry vs. United States, 256 U. S. 232 26

Railway Co. vs. Dey, 35 Fed. 866 ..... 17, 19

Tozer vs. United States, 52 Fed. 917 17

Trade Mark Cases, 100 U. S. 82 17

United States vs. Armstrong, 265 Fed. 683 .. 17, 18, 20

United States vs. Brewer, 139 U.S. 278, 288 ..... 17, 18, 20

United States vs. Curtis, 12 Fed. 824 ..... 14, 15, 27

United States vs. Gradwell, 243 U. S. 476 .. 26

United States vs. Lacher, 134 U.S. 624, 628 17

United States vs. Reese, 92 U. S. 214 17

United States vs. Riley, 74 Fed. 210 15

United States vs. Scott, 74 Fed. 213 15

Page

Statutes:

Criminal Code Act, Mar. 4, 1909, c. 321, 35 Stat. 1110 4
Sec. 118, Criminal Code 4
Sec. 122, Criminal Code 25
Corrupt Practices Act, Act Feb. 28, 1925, c. 368 43 Stat. 1073 4
Sections 302, 312, 318, Corrupt Practices Act, 1925 ..... 4, 5
Sections 314, Corrupt Practices Act, 1925 23
United States Code, Act June 30, 1926, 44 Stat. 1 ..... 23, 24
Sec. 208, c. 5, Title 18, U. S. C. 5
Sec. 212, c. 5, Title 18, U. S. C. 23
Enacting Clause, U. S. C. 24
Act, Aug. 15, 1876, Sec. 6, 19 Stat. 169 29
Act, Jan. 16, 1883, Sec. 11, 22 Stat. 406 13,15
Act, June 25, 1910, 36 Stat. 822, Corrupt Practices Act 7
Act, Aug. 19, 1911, 37 Stat. 25, Corrupt Practices Act 7
Act, Aug. 23, 1912, 37 Stat. 360 7
Act, Oct. 16, 1918, 40 Stat. 1013 7
Official Circular letter of Clerk of House 16

No. 66

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

UNITED STATES OF AMERICA, Appellant,

vs.

HARRY M. WURZBACH, Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE

This is an appeal from a judgment of the United States District Court for the Western District of Texas at San Antonio, sustaining a motion to quash an indictment returned at the Waco Division of the Court against Harry M. Wurzbach.

The indictment, according to the endorsement thereon, is for violation of Section 208 of Chapter 5, Title 18, of the United States Code (Section 312 Corrupt Practices Act, February, 1925; 43 Statutes, 1073), and contains

six counts. In Counts One, Three and Five, it is charged that during the months of June and July, 1926, appellee received contributions from H. M. Holden, a United States Attorney, in the sum of $100.00, and from H. F. Geyer and Ernest J. Keudell, railway postal clerks, $25.00 and $50.00, respectively, for "a political purpose,—that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the primaries held on the 24th day of July, 1926, for the office of Representative in Congress from the 14th Congressional District of Texas". Counts Two, Four and Six are based upon the same alleged tranactions referred to in the other three Counts, and charge in the language of the statute, that appellee was "concerned in receiving" said sums of money from the persons and for the purposes mentioned in Counts One, Three and Five. (R. pp. 1-5).

On March 13, 1929, appellee filed a motion to quash the indictment on the ground that the acts charged did not constitute a violation of any law of the United States. (R. p. 6). Hearing was had on this motion on March 23, 1929, and resulted in the motion being sustained, and an order to that effect was duly entered. (R. p. 7). The reasons given by the learned trial judge for sustaining the motion to quash were, as set forth in his order, that (a) the law upon which the indictment is based, is not applicable to primary elections, and (b) if it were intended to apply to primary elections, it was, to that extent, "probably unconstitutional". (R. p. 7). The trial judge also filed a written opinion in the case, which has been reported and appears in 31 Federal (2nd Series), page 774. The opinion also appears in the transcript. (R. p. 8). In this opinion, the Court gives as an additional reason for sustaining the motion to quash, that the statute is of un-

certain and doubtful meaning and fails to clearly define the offense.

QUESTIONS PRESENTED

We think the record presents an additional question to the two stated in the brief of counsel for the Government. In addition to the question of the applicability of the law in question to the facts set forth in the indictment, and of its constitutionality, if applicable, there is presented the question of whether the law is sufficiently definite and certain to constitute a valid and enforceable penal statute.

We shall present our contentions under three propositions. First, that Section 118 of the Act of March 4, 1909, as amended by Section 312 of the Act of February 28, 1925, is not applicable to the acts charged in the indictment; second, that it is so general, uncertain and indefinite as to render it invalid; and third, that if it is applicable to primary election campaigns for party nominations, that it is beyond the power and authority of Congress and is, therefore, unconstitutional.

APPELLEE'S PROPOSITION NUMBER ONE

Section 312 of the Corrupt Practices Act of February 28, 1925, (U. S. C. Title 18, Section 208), upon which the indictment is based, is not applicable to the receiving by a candidate for Representative, of contributions from officers or employees of the United States, for the purpose of promoting his candidacy for a party nomination, in a primary election.

STATEMENT

Section 208 of the present Code was formerly Section 118 of the Act of March 4, 1909, (35 Statutes, 1110), entitled "An Act to codify, revise and amend the penal laws of the United States", and so remained until it was amended and incorporated into and made a part of the Act of February 28, 1925, known as the Federal Corrupt Practices Act. (43 Statutes, p. 1073).

Prior to its amendment, Section 118 Criminal Code Act of March 4, 1909, read as follows:

> "No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States".

Section 302 of the Federal Corrupt Practices Act, 1925, reads in part as follows:

> "When used in this title—
>
> "(a) The term 'election' includes a general or special election, and, in the case of a Resident Commisioner from the Philippine Islands, an election by

the Philippine Legislature, but does not include a primary election or convention of a political party;

"(b) The term 'candidate' means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected".

Section 312 of the Federal Corrupt Practices Act, 1925, reads as follows:

"Section 118 of the Act entitled 'An Act to codify, revise, and amend the penal laws of the United States,' approved March 4, 1909, is amended to read as follows:

"'Sec. 118. It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person'".

Section 318 is the repealing section, and by it all laws which relate to Federal control or authority over primary elections, are expressly repealed.

ARGUMENT

In construing a statute, the intention of the law-making body should be sought, and when ascertained, should be given controlling influence. What then was

the intention of the Congress in amending this Section and incorporating it into the Act of February 28, 1925? Our contention is that the amendment of Section 118 and its incorporation into this Act shows that the Congress intended its provisions, as amended, should be brought within the limits of the subject matter with which the act dealt, namely, the receiving, disbursing and reporting of contributions made to and received by political committees and candidates for office, for the purpose of carrying on political campaigns at general and special elections; or in other words, using the language of the learned trial judge, the intention was that the "political purpose", for which the persons mentioned in Section 312 of the Act, were forbidden to receive contributions from Federal officers or employees, should be a "Federal political purpose". Had Congress not intended to so limit the field within which old Section 118 should operate, why should it have been made a part of an Act, which by its own terms, was confined to political matters relating *solely* to general and special elections, which expressly excluded primary elections from its scope, and which expressly repealed all existing laws relating to primary elections? Section 118 of the Criminal Code could certainly have been amended without making it a part of this Act, had Congress intended to leave it as it was.

The learned counsel for the Government say, that there is nothing in the legislative history of the Corrupt Practices Act of 1925, to indicate that by incorporating in it Section 118 of the Act of March 4, 1909, there was any purpose to alter the "previously existing scope of that Section". Let us see about that. We shall refer to the "previously existing scope" of the Section presently, when we shall discover that neither Section 118 nor its ancestor,

Section 11, of the Act of January 16, 1883 (22 Statutes, 406) had ever been applied to any political purpose other than purposes connected with or relating to general elections. But for the moment, let us consider briefly the situation immediately confronting Congress at the time of the introduction and passage of the Corrupt Practices Act of February 28, 1925.

In 1910, Congress had passed a Corrupt Practices Act limiting the amounts of money which candidates for Federal offices could spend, providing for a system of accounting and for making reports which would insure publicity of campaign contributions, and other regulatory provisions governing elections. (Act June 25, 1910, 36 Statutes, 822). In 1911, a lengthy amendment to the 1910 Act had been enacted, which amendment undertook to apply the provisions of the 1910 Act and additional regulations, to campaigns in primary elections. (Act Aug. 19, 1911, 37 Statutes 25). In 1912 and 1918, other Acts had been passed containing regulatory provisions which included primary elections. (Act August 23, 1912, 37 Statutes, 360, and Act October 16, 1918, 40 Statutes, 1013). On May 2, 1921, had come the decision of this Court in the case of United States versus Newberry, in which this Court held in effect that Congress was without authority to fix the maximum sum which a candidate "may spend or advance or cause to be contributed and spent by others to procure his nomination", and that, therefore, the Corrupt Practices Act of 1910, as amended by the Act of 1911, was unconstitutional.

Such then was the situation when the Corrupt Practices Act of February 28, 1925, was introduced. Now, is there anything to indicate that Congress had the decision

in the Newberry case in mind when this Act was introduced? It is quite clear that Congress did, for we find upon referring to the Report of the House Committee on Election of President, Vice-President and Representatives in Congress, which is quoted at page 21 of appellant's brief (for which we are duly grateful) that the Newberry case is expressly mentioned as one of the reasons for the new Corrupt Practices Act.

We quote from the Report as it is given in the brief:

> "The existing law regulating corrupt practices in elections has been enacted in piece-meal fashion and consists of six separate Acts of Congress, passed, respectively, in 1907, 1909, 1910, 1911, 1912 and 1918".

In referring to an Act passed in 1909, is it not reasonable to assume that the Committee meant the Act of March 4, 1909, and particularly Section 118 of that Act, indicating that they considered this Section one of the "piece-meal" Acts regulating corrupt practices in elections, and not primarily an Act regulating the conduct of Government officers and employees?

Again referring to the Report of the Committee, we quote:

> "These laws are in part antiquated, because of additional amendments to our Constitution. They are unconstitutional in part, because of the decision of the United States Supreme Court in the Newberry case".

In what respect were those laws "unconstitutional in part"? Obviously insofar as they applied to primary elections.

And in conclusion, the Committee said:

> "H. R. 8956 represents an attempt to make an orderly revision of the existing law, eliminate its uncertainties and unconstitutional portions, and add provisions deemed necessary to cure defects in the present statutes."

And may we say here, we think it reasonable to believe that in the preparation and passage of the new Corrupt Practices Act, Congress regarded the decision of this Court in the Newberry case as definitely placing primary elections outside the field of Congressional power and authority, and little emphasis was placed upon the particular ground upon which the decision rested. The important and outstanding fact was that primary elections were held to be State affairs, and the important question as far as Congress was concerned, was that of its future purpose and policy in the preparation and enactment of measures dealing with the raising and disbursing of campaign funds. The natural and logical, and in fact the only thing to do, was to confine such measures to general and special elections, or in other words, to "Federal political purposes". We think this policy and purpose is clearly reflected in the Corrupt Practices Act of 1925. We are not now discussing the question of constitutionality, but the purpose and intent of Congress as to the "political purposes", to which said law, including Section 312, should be applied.

Let us next see how the policy and purpose stated in the Report of the Committee to revise, co-ordinate, and avoid constitutional pitfalls, was carried out in the bill which accompanied it, and which was duly enacted into law. It begins with the declaration, in Section 302, that the political subjects to be dealt with are general and

special elections and not primary elections or nominating conventions; and it concludes by repealing, in Section 318, the Corrupt Practices Act of 1910 as amended by the Act of August, 1911, and every other then existing Act by which Congress had, prior to the decision in the Newberry case, undertaken to deal with matters pertaining to primary elections. And in such a law, so conceived and so written, was incorporated Section 118 of the Act of March 4, 1909, becoming Section 312 of the Corrupt Practices Act of 1925. We confidently believe, that in making Section 118 a part of the Corrupt Practices Act, the law-making body clearly manifested the intention to limit the application of the words "for any political purpose whatever" in Section 312, to matters within the boundaries of the Acts clearly defined field of operations, namely, general and special elections. So limited and construed, the Section harmonizes with the expressed purpose and policy of the Act, falls clearly within the field of Federal jurisdiction, and is consistent with the other Sections and provisions of the Act. Not so limited, it is out of harmony with the purpose and policy of the Act, is a legislative misfit, is inconsistent with the other Sections and provisions, and in view of the nature of the amendment, is of doubtful constitutionality.

This brings us to the consideration of the words which were added to Section 118 when it was incorporated into the Corrupt Practices Act of 1925, the addition of which words further demonstrates that Section 312 was not intended to be applicable to matters connected with or relating to campaigns for party nominations. It will be noted that by the amendment there is an enlargement of the classes of persons who were formerly subject to the provisions of Section 118. We find that the words "*any*

candidate for, or individual elected as", Senator or Representative were added and now appear in Section 312. This is really the only important change in the law as it existed prior to the amendment, the other changes being principally to improve the phraseology, and in view of the fact that the words, *"any candidate for, or individual elected as"*, of course, include persons who may not be officers or employees of the United States, we think the addition of these words is conclusive evidence of the intention of Congress to apply Section 312 only to Federal political purposes. It will not be presumed, especially in view of the announced purpose of the Committee which reported the bill to avoid such an eventuality, that Congress intended to pass an unconstitutional measure, and yet counsel for the Government concede that the law would be unconstitutional if it included persons who had no official relation with the Government. Construing the Section, however, as we contend it should be construed, there would be no objection on constitutional grounds, and it would be perfectly proper to include persons who had no official relations with the Government. We think it further convincing evidence that the purpose of Congress was to limit the application of Section 312 to the matters to which every other section of the law was limited.

As further and conclusive evidence of the purpose and intent of Congress, we direct attention to subdivision (b) of Section 302 of the Corrupt Practices Act, which reads as follows:

> "The term *'Candidate'* means an individual whose name is presented *at an election for election* as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected".

Subdivision (a) of Section 302 reads in part as follows:

> "The term *'election'* includes a general or special election . . . . *but does not include a primary election or convention of a political party*".

It is, therefore, apparent that the word "candidate", as it is used in Section 312, does not include a candidate for a party nomination in a primary election or convention, but is expressly limited to persons who are candidates in general and special elections and, therefore, *the contributions for political purposes, forbidden by said Section, do not include contributions made to candidates for party nominations as Senators or Representatives in primary elections, whether they be candidates running for the first time, or whether they be Senators or Representatives standing for re-election.* As to the other classes of persons referred to in said section, we do not think it reasonable to believe that Congress intended that as to some, the words "any political purpose whatever", should refer to both Federal and State political purposes, and that as to others, they should be limited to Federal political purposes. We think it much more reasonable to believe that the Section was to be limited to Federal political purposes as to *all the persons* embraced within its provisions. If the original primary purpose of Section 118 was to regulate the conduct of Federal officers and employees in respect to political matters, it would appear that Congress has decided to restrict such regulations and prohibitions to matters which lie clearly within the domain of Federal jurisdiction. Even so restricted, the law may still be given a very wide application for the purposes for which money may be solicited, contributed and received by Federal officers and employees in connection with general and special

elections, are numerous and varied. The adoption of restrictive regulations with reference to primary elections, may well be left to the legislatures of the States.

There does not seem to be any reason to anticipate that any disasters or serious consequences will result from giving the law the more limited application, in view of the fact that not a single case for violation of the provisions of Section 118 has ever been brought before the courts, and since the original Act was adopted in 1883, there have been only two or three reported cases involving violations of its provisions! In view of this rather remarkable record, there is little reason to anticipate that there will be any change in the situation by giving the law the construction which we contend Congress intended it should be given.

Referring now, briefly, to the history of the law in question prior to its incorporation into the Federal Corrupt Practices Act, we assert that there is nothing in that history which would render it strange, or unusual, or unlikely, for Congress to have limited its application to Federal political purposes,—that is to say, to purposes connected with general and special elections. At the time of the enactment of the Act of January 16, 1883 (22 Statutes, 406), Section 11 of which was the legislative antecedent of Section 118 of the Criminal Code, primary elections could not, of course, have been within the view of Congress, as they were then unknown and continued unknown for many years thereafter. Since nominating primaries have become the recognized method of selecting the nominees of political parties, no court, it appears, has been called upon to determine the scope which should be given to the law in question. The few cases in which the law has come before the courts were brought before

the day of primary elections, and an inspection of the records of those cases, as they appear in the Reports, reveals that the contributions involved were made in connection with general elections. In no case, so far as we have been able to discover, has the scope of the words " for any political purpose whatever" been defined, and in no case have they been held to include purposes other than those connected with general elections.

In the case of United States vs. Curtis, 12 Fed. 824, 106 U. S. 371, decided in 1882, from which counsel quote so extensively, the indictment charged Curtis, a Federal employee, with receiving contributions from other employees for political purposes, during October, 1881, for use by "the Republican State Committee *in the then pending campaign*", which obviously referred to the general election of the year mentioned. Counsel appear to have inadvertently overlooked the words which we have italicized, in their reference to this case, and have thereby been misled into conveying the erroneous impression that the political purpose for which the contributions were made and received might have been a State political purpose. The broad contention of the defendant Curtis was that there was no constitutional warrant whatever, for imposing such restrictions and inhibitions on Federal employees, as were imposed by the law upon which the indictment was based, which was Section 6 of the Act of August 15, 1876, 19 Statutes 143,169. The opinion of the Court, as it is quoted at page 8 of the brief of appellant, states that this was the contention. The facts being as stated, and the law upon which the prosecution was based embracing only Federal employees, both the Circuit Court and this Court correctly held that the law was constitutional and that the indictment charged an

offense. The question of whether or not the Statute under consideration in the Curtis case could lawfully be applied to State political purposes as well as Federal political purposes, was not presented and was not decided by either the Circuit Court or by this Court in the Curtis case.

The only two cases in which Section 11 of the Act of January 16, 1883, seems to have been presented to the Courts for consideration, are United States vs. Riley, 74 Fed. 210 (C. C. Ky. 1895) and United States vs. Scott, 74 Fed. 213 (C.C. Ky. 1895), companion cases, in which the questions presented to the trial judge were as to whether or not the offense was properly described in the indictment, and questions as to variance between the allegations of the indictment and the evidence. The meaning and scope of "political purpose" was not presented and was not defined.

Such then was the judicial history of this law when it was made a part of the Federal Corrupt Practices Act of 1925, and we reiterate that there is nothing in it which would in any way militate against or render improbable, the intention of Congress to limit its application to the clearly defined purposes of said Act.

Concluding our argument in support of our first proposition, may we be permitted to quote part of an official circular letter written and distributed among the members of the House of Representatives, by the Clerk of the House. This letter contains a quotation from the Report of the Committee which reported the bill known as the Federal Corrupt Practices Act, 1925, and as, in the hurried preparation of this brief, this letter is the only form in which the Report is available to us, we beg leave to quote therefrom as follows:

"Wm. Tyler Page
"Clerk.

"House of Representatives
"Clerk's Office
"Washington, D. C.

"SUBJECT: CAMPAIGN RECEIPTS AND EXPENDITURES

"April 1, 1926.

"Dear Sir:

"The Federal Corrupt Practices Act, 1925, does not apply to primary elections or conventions.
"The law makes this definition—

> "'The term 'election' includes a general or special election * * * but does not include a primary election or convention of a political party'.

"The House Committee in its report on the bill which became the Federal Corrupt Practices Act, 1925, said:

> "'The limitation in the bill as to expenditures by a candidate applies only to the campaign leading up to the final election, and not to the primary campaign'.

"Inclosed is a copy of the Federal Corrupt Practices Act, 1925, also a blank form of Statement of Receipts and Expenditures of candidate for election as Representative in Congress, prepared in accordance with the provisions of said Act * * * ".

"Very truly yours,

"Wm. Tyler Page, Clerk of the House of Representatives."

We think the foregoing quotation is an additional cir-

cumstance indicative of the purpose and intention of the Congress and of the construction which it placed upon the Federal Corrupt Practices Act, 1925, including Section 312 thereof.

APPELLEE'S PROPOSITION NUMBER TWO.

The law upon which the indictment is based, Section 312, Corrupt Practices Act (Section 208, c. 5, Title 18, U. S. C.) is invalid, because of ambiguity and uncertainty and because it fails to clearly define the offense denounced therein.

AUTHORITIES.

United States vs. Brewer, 139 U. S. 278, 288.
United States vs. Lacher, 134 U. S. 624, 628.
United States vs. Armstrong, 265 Fed. 683.
McFarland vs. United States, 19 Fed. (2nd Series) 807.
United States vs. Reese, 92 U. S. 214.
Trade-Mark Cases, 100 U. S. 82.
James vs. Bowman, 190 U. S. 127.
Railway Company vs. Dey, 35 Fed. 866.
Tozer vs. United States, 52 Fed. 917.

ARGUMENT

Counsel for appellant seem to be of the opinion that the trial court did not hold that the statute was invalid because of uncertainty and ambiguity, without regard to the authority of the Congress to enact it. We think counsel are mistaken. We quote from the opinion of the Court, 31 Fed. (2nd) 774:

"The Act in question is highly penal, and, because

of ambiguity and uncertainty, the rule of strict construction should be applied. In construing a penal statute all reasonable doubts concerning its meaning should operate in favor of the respondent. Harrison v. Vose, 9 How, 372". Again: "Following the principles announced in the cases quoted, it is plain that the statute fails to clearly define the offense which it seeks to punish; nor do the objects and purposes of the act definitely appear to be within the limits of the enacting power of Congress".

And then, stating his conclusions, the Court says:

> "From the foregoing premises, the following conclusions result: That the act in question being penal in character, and uncertain and doubtful in meaning, such doubts will be construed to the benefit of defendant . . . . " (P. 777).

It will be at once observed by referring to the opinion that the third conclusion of the Court, touching the question of constitutionality, is separate and distinct from the first conclusion above quoted relating to uncertainty.

In referring to the authorities cited, we will simply quote briefly from two or three of them, the familiar tests to be applied in determining the sufficiency of a penal statute:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute.
>
> United States v. Lacher, 134 U. S. 624, 628".
> United States vs. Brewer, 139 U. S. 278.
>
> "A criminal statute to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act

is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it".

United States vs. Armstrong, 265 Fed. 683.

"No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it".

Railway Co. vs. Dey, (Justice Brewer), 35 Fed. 866.

Applying the foregoing tests to the statute in question, we contend that it is invalid because of uncertainty and ambiguity, as to (a) the persons to whom it is applicable; (b) the nature of the acts or conduct which it prohibits; and (c) the punishment to be imposed for its violation.

1. Taking these criticisms in the order in which they are stated, we consider first that of uncertainty and ambiguity as to the persons to whom the law is applicable. The ambiguity in this respect is created by the last words of Section 312 of the Corrupt Practices Act, 1925, "from any other such officer, employee, or person", considered in connection with the added words "any candidate for, or individual elected as . . . . " in the first part of the Section.

In our discussion of our first proposition, we have pointed out that it is quite clear that in amending Section 118 of the Act of March 4, 1909, the classes of persons embraced within its provisions had been increased so as to include candidates for office, persons who had been elected but who had not been seated, and persons

who had been candidates but who had been defeated. Obviously such persons would not necessarily be included in "other such officer, employee, or person". So that in spite of the clearly manifested intention to enlarge the classes of individuals to be brought within its scope, the law is rendered ambiguous and uncertain, because of the inaptness of the closing words of this Section as amended.

2. The statute does not define the acts or conduct intended to be prohibited by it, with the requisite certainty and clearness of a penal statute. The persons enumerated therein are prohibited from directly or indirectly soliciting or receiving contributions, or from being in any manner concerned in soliciting or receiving contributions, *"for any political purpose whatever"*.

When the meaning of these words is considered, we are impressed by the fact that they include practically everything touching the relationship of the individual to or with organized society. The trial Court was fully justified in saying that these words were "infinite in extent". This Court has said in United States vs. Brewer, *supra*: "Laws which create crime ought to be so explicit that all men subject to their penalties, may know what acts it is their duty to avoid". And as was well said by the trial judge in United States vs. Armstrong, *supra*: "A criminal statute to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it". Can this Court, or any court, or any man say that "all men" or the "ordinary man", subject to the pro-

visions of this law, "may know what acts", it is their or his "duty to avoid"? Even if we limit the law to the immense army of Government officers and employees, who can say what, in this day and time, those citizens may or may not do under this statute, in the exercise of their rights and privileges as citizens? As a matter of fact, there are, in our opinion, very few things left that they can do in their civic relationship with one another without violating at least the letter of this statute, and if this be true, it has no right to live as a penal enactment.

The words "for any political purpose whatever", cannot be said to have been given any definite or settled judicial construction. In the very few cases in which they have been considered by the courts, as we have already pointed out, the political purpose in question was connected with campaigns in general elections, and, therefore, the courts have not been called upon to go further than to hold that contributions for use in general election campaigns, were within their meaning. So their meaning and scope remain unexplained and undefined by this Court. Counsel for the Government in their brief, apparently concede that as to citizens, who may be in the employ of the Government, the statute is uncertain and indefinite. At page 8 of their brief, we read: "The words 'for any political purpose whatever' have been in the statute since the original Act of January 16, 1883, c. 27, Sec. 11, 22 Stat. 403, 406. Similar language has been used in other Acts, and up to the time of the decision below no court had suggested that there was *any political purpose which it did not cover*". Again, at page 18, we read: "The statute is directed at contributions for *any* political purpose, because the evil effect on the employee is presumably the same, *regardless of what the political purpose may be*". The italics are ours.

Limited, as we believe it has been limited, as we have attempted to show, the statute in question is necessary and beneficial. But if it is to be given the unlimited application contended for by counsel for the Government, (and which its language would seem to justify), it were better to permit it to resume the long sleep in which it had rested undisturbed for more than a quarter of a century until aroused, for some reason, by the District Attorney for the Western District of Texas. So construed, this law would be arbitrary and tyrannical.

What is a *political* purpose? In Words and Phrases, Volume 6, we find "political" defined as follows:

> "The word 'political' is defined by Bouvier to be pertaining to policy or the administration of government. People v. Morgan, 90 Ill. 558, 563.
>
> "The word 'Political', in its higher and true sense, means that which pertains to the government of a nation. In this sense, it includes the entire system of its laws, constitutional and statutory . . . . In re Kemp 16, Wis. 359, 396".

In Funk & Wagnalls Standard Dictionary, and the definition is substantially the same in Webster, we find the following definition:

> 1. Pertaining to public policy; concerned in the administration of Government; belonging to the enactment and administration of the laws; as political management; a political system.
>
> 2. Belonging to the science of Government; treating of policy or politics; as political principles.
>
> 3. Having an organized system of Government.
>
> 4. Pertaining to or connected with a party or

parties seeking to control Government in a State; as political methods; a political campaign.

Bearing in mind that for those mentioned in it, the statute declares that it shall be unlawful for them to *"directly or indirectly* solicit, receive, or be *in any manner concerned* in soliciting or receiving any assessment, subscription or contribution *for any political purpose whatever"*, and bearing in mind that there is no settled judicial interpretation of this statute, we respectfully submit that it is too general, uncertain and indefinite to constitute a valid penal statute.

3. The punishment to be imposed for violation of the law, as it now stands, is uncertain.

Section 312 of the Federal Corrupt Practices Act is now Section 208 of Title 18 of the United States Code, adopted June 30, 1926. The punishment for violation of Section 208 is fixed by Section 212 of the Code, same title and chapter which provides:

"Whoever shall violate any provision of Sections 208 to 211 of this title, shall be fined not more than $5,000.00, or imprisoned not more than three years, or both. (Jan. 16, 1883, c. 27, Sec. 15, 22 Stat. 407; Mar. 4, 1909, c. 321, Sec. 122, 35 Stat. 1110".

Now, when we turn to the Federal Corrupt Practices Act of 1925, we find that a different penalty was affixed for the violation of Section 312 of that Act, now Section 208 of the Code. Section 314 of the Corrupt Practices Act reads:

"Sec. 314. (a) Any person who violates any of the foregoing provisions of this title, except those for which a specific penalty is imposed by sections

312 and 313, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) Any person who willfully violates any of the foregoing provisions of this title, except those for which a specific penalty is imposed by sections 312 and 313, shall be fined not more than $10,000 and imprisoned not more than two years".

As no specific penalty is imposed by Section 312 for its violation, the general penalties imposed by Section 314 would apply. These penalties, it will be noted, however, differ from the penalty imposed for violation of Section 208 of the United States Code by Section 212 of that Code, which we have quoted.

The incorporation of all of the laws of the United States into the Code did not change, or amend, or repeal any of the laws in existence at that time. Referring to the enacting clause of the Act of June 30, 1926, 44 Statutes, 1, we read:

"Sec. 2. . . . (a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments".

The thought here suggests itself that in view of the reservations contained in this enacting clause that the penalties imposed by the Federal Corrupt Practices Act would

apply, but the trouble is, at the time of the adoption of the Code, there was a law imposing a penalty for violation of Section 118, and this law has also been carried into the Code.

The penalty for violation of Section 118 of the Criminal Code, Act March 4, 1909, prior to its incorporation into the Federal Corrupt Practices Act, was fixed by Section 122 of said Code, as follows:

> "Sec. 122. Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both".

This Section was embraced in the Act of June 30, 1926, and now appears as Section 212, c. 5, Title 18 of that Act, which we have quoted above.

We submit that the law in question is also invalid because the punishment to be imposed for its violation is uncertain.

APPELLEE'S PROPOSITION NUMBER THREE.

If Section 312 of the Corrupt Practices Act (Sec. 208, c. 5, Title 18, U. S. C.), is applicable to the acts set forth in the indictment, it is unconstitutional because (a) Congress is not vested with authority to regulate the receipts and disbursements of candidates for party nominations in primary elections; and (b) because it is an unauthorized exercise of the discretion vested in Congress to regulate and control the political rights and privileges of officers and employes of the United States.

AUTHORITIES.

Newberry vs. United States, 256 U. S. 232.
United States vs. Gradwell, 243 U. S. 476.
Curtis vs. United States, 12 Federal 824; 106 U. S. 371.

ARGUMENT

1. If we are correct in our assertion that Section 312 of the Federal Corrupt Practices Act, 1925, includes persons other than officers and employees of the United States, then this case would be ruled by the decision of this Court in the Newberry case, *supra*, and said Section would be unconstitutional. This seems to be conceded by counsel for appellant, for in their attempt to distinguish the Newberry case from the case at bar, they say at page 16 of their brief:

> "The *Newberry case, supra*, arose under the Act of June 25, 1910, as amended by the Act of August 19, 1911 (statute set forth 256 U. S. 232, 243), which attempted to put a limitation upon the amount which a candidate for Senator or Representative might give or expend in procuring his nomination and election. *This was an attempt to control conduct with respect to nomination and election of candidates who had no official relation with the Government.* Such legislation was to be supported, if at all, by Section 4, Article I, of the Constitution, which conferred upon Congress the power to alter such regulations as the States might make regarding the *times, places,* and *manner* of holding elections for Senators and Representatives. This Court held that such provision did not cover primary elections". (Italics our own.)

In the case of United States vs. Curtis, 12 Federal 824, 106 U. S. 371, cited by counsel, the statute under consideration (Act August 15, 1876, U. S. C. Title 18, Sec-

tion 213) embraced only officers and employees of the United States and its constitutionality was upheld solely on that ground.

That Section 312 includes persons other than officers and employees of the United States, we think we have clearly shown in our argument in support of our first proposition, to which we respectfully refer the Court so as to avoid repetition here.

2. But even if Section 312 could be said to include only officers and employees of the United States, we contend that it is so general and so far-reaching as to transgress the discretion vested in the Congress to regulate and control citizens who may be officers or employees of the United States, unless it has indeed been limited, as we contend it has. We recognize that the legislative discretion covers a wide range and that the Congress may enact any laws appropriate to its exercise, but we do not believe that the law involved in this case is appropriate legislation for that purpose.

That there are limits to the lengths to which the Congress may go in imposing restrictions and prohibitions upon, and regulating and controlling the conduct of, officers and employees of the United States, is shown by the decision of the Circuit Court and of this Court in the Curtis case, *supra*, cited by counsel for appellant, and upon which they rely. We quote first from the opinion of the Circuit Court (p. 839):

> "This legislative discretion embraces a large field, and its boundaries can not always be readily located. It is only when Congress has palpably transgressed the limits of its discretion that the judicial departments will intervene. Such a case might arise if

> Congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character".

And in this same case, this Court said, (106 U. S. 371):

> "The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges".

And again, this Court said, (106 U. S. 373):

> "What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion".

These citations will be sufficient to show that there are limits beyond which legislative authority may not go, even in the regulation of Government officers and employees. We believe this law, if it is to be held applicable to the financial participation of such officers and employees with one another in "any political purpose whatever", goes beyond the limits of Governmental authority.

We believe it does attempt to prohibit all contributions of money or property by the designated officers or employees of the United States for political purposes. We believe it does prohibit them altogether from receiving or soliciting money or property for such purposes. We believe it does much more than simply forbid

their receiving from or giving to each other. We believe that beyond these things, many restrictions are placed on their political privileges. Section 6 of the Act of August 15, 1876, which this Court had under consideration in the Curtis case, *supra*, was a more limited one than the statute involved in this case. It reads as follows:

> "Sec. 6. That all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars".

It will be observed this old law embraced a much more limited class of officers or employees; that it did not include *"directly or indirectly"* requesting, giving or receiving or of being *"in any manner concerned in"* requesting, giving or receiving, nor did it include *"any political purpose whatever"*, as does the law now in question. We think these differences make the present law radically different from the one which was under consideration in the Curtis case. In the latter case, this Court said:

> "The managers of political campaigns not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees". (P. 373).

This could not be said of the law now in question. The receipt by a candidate's campaign manager of contributions from Government officers and employees would undoubtedly be an indirect receiving of such contributions by the candidate, and he would certainly in that way be "concerned in" receiving them. It seems to us difficult to conceive of any way under the present law, given the broad interpretation contended for in which a candidate could accept the benefits of even voluntary contributions made by his friends who might be officers or employees of the United States. It seems to us that this is going entirely too far and beyond the legislative discretion vested in Congress.

In our argument under our second proposition, we attempted to point out the all-embracing sweep of the words "for any political purpose whatever", and we shall not here repeat what we there said in that connection. One might enumerate a long list of perfectly legitimate contributions which would fall under the ban of this statute. For example, if the President of the United States should accept an invitation to visit some city for the perfectly legitimate and proper purpose of delivering an address on the plans, purposes and policies of his administration and his party, as he recently did at Louisville, Kentucky, and it became necessary to raise sufficient funds to meet the expenses incident to renting a suitable building, radio broadcasts, and other perfectly legitimate expenses, and the postmaster or some other local official should receive voluntary contributions from other Government officials and employees in the city so honored, for the purposes mentioned, they would undoubtedly be contributing to, and the postmaster or other official would be receiving their contributions for, a political purpose prohibited by

this law. We do not consider this example at all far-fetched, and numerous other examples readily come to mind of legitimate rights and privileges, the exercise of which the Congress would have no right to deny a citizen, even though that citizen might be an officer or employee of the United States. The statute extends into the fields of education, legislation, immigration, administration of the law and other fields within which Congress could not properly regulate and control the activities of officers and employees of the United States. There is practically no limit to the lengths to which a designing or malicious district attorney might go in persecuting citizens under this statute, if it is to be held applicable to Federal, State and municipal purposes, and to *"any political purpose whatever"!*

We respectfully submit that the statute transgresses the legislative authority vested in the Congress and is, therefore, unconstitutional.

CONCLUSION.

This brief has of necessity been written hurriedly, and we realize its imperfections. We venture to express the hope, however, that we have succeeded in presenting the material issues in the case, inadequate though their presentation may be, in such a way as to be of some slight assistance to the Court in reaching its decision. We respectfully submit that the action of the Court below, in quashing the indictment, was proper, and we pray that the judgment be affirmed.

HUGH R. ROBERTSON,
Attorney for Appellee.